LIBRARY

Office-Supreme Court, U.S.
FILED
JAN 26 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of The United States

October Term 1965

No. 879

MEYER GLAZER,
Petitioner

v.

LOUIS JOSEPH BOVE.
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

RESPONDENT'S BRIEF

WILLIAM M. HARRIS
TERRY H. DAVIS, JR.
Attorneys for Respondent
1412 Maritime Tower
Norfolk, Virginia

WITHERS PRINTING CO. - NORFOLK, VA.

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Questions Presented for Review	2
Statement of the Case	3
Argument in Support of Respondent's Contentions	3
1. WHETHER THIS COURT HAS JURISDICTION IN REGARD TO THIS CAUSE WHEN THE FEDERAL ISSUE WAS NOT RAISED IN THE SUPREME COURT OF APPEALS OF VIRGINIA AND INADEQUATELY MENTIONED IN THE COURT OF LAW AND CHANCERY OF THE CITY OF NORFOLK	3
2. WHETHER THE *VOIR DIRE* EXAMINATION IN THIS CAUSE RAISES A FEDERAL QUESTION UNDER THE FOURTEENTH AMENDMENT	5
3. WHETHER THE FAILURE OF THE TRIAL JUDGE TO ALLOW THE JURY TO BE INTERROGATED IN THIS CAUSE RAISES A FEDERAL ISSUE UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION	7
Conclusion	8
Appendix	1a

TABLE OF CITATIONS

	Page
Beck v. Washington, 369 U.S. 54 (1962)	4
Bowe v. Scott, 233 U.S. 658, 664-5 (1914)	4
Bradfield v. Board of Education, 128 W. Va. 228, 36 S.E. 2d 512 (1900)	6
Deigado v. Chovez, 140 U.S. 586, 588 (1891)	7
Holmes v. Conway, 241 U.S. 624, 631 (1916)	7
Jordan v. Massachusetts, 225 U.S. 167, 176 (1912)	7
Kiernan v. Van Schaik, 347 R. 2d 775 (3rd Cir., 1965)	5, 6
Long Island Water Supply v. Brooklyn, 166 U.S. 685, 694 (1897)	7
Maxwell v. Dow, 176 U.S. 581, 602 (1900)	7
Montana Co. v. St. Louis, 152 U.S. 160 (1894)	7
New York C.R. Co. v. White, 243 U.S. 188, 208 (1917)	7
New York Ex rel Bryant v. Zimmerman, 278 U.S. 63, 67-8 (1928)	4
Oxley Stave Co. v. Butler County, 166 U.S. 648, 655 (1897)	4
Snyder v. Massachusetts, 291 U.S. 97, 195 (1934)	7
Walker v. Sauvinet, 92 U.S. 90 (1876)	7
Worrell v. Worrell, 174 Va. 11, 4 S.E. 2d 343 (1939)	6

STATUTES, etc.

28 U.S.C. 1257	1
United States Supreme Court Rule 23 1 (f)	4
United States Supreme Court Rule 19	5
Virginia Code Annotated, Sec. 8-199	6

IN THE

Supreme Court of The United States

October Term 1965

No. 879

MEYER GLAZER,
Petitioner

v.

LOUIS JOSEPH BOVE.
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

RESPONDENT'S BRIEF

Respondent, Louis Joseph Bove, submits that a writ of certiorari should not issue to the Supreme Court of Appeals of Virginia to review the judgment of that Court entered in the above styled matter on October 6, 1965.

OPINIONS BELOW

Respondent adopts the rulings as shown in the petitioner's Appendix on pages A-1, A-2 and A-3, C-8 and C-9.

JURISDICTION

The respondent respectfully submits that this cause does not raise a Federal question under *28 U.S.C. 1257* or

any other statute over which this Court would exercise jurisdiction. The petitioner failed to raise a Federal issue in the Supreme Court of Appeals of Virginia. The petitioner also failed to properly raise a Federal issue in the Court of Law and Chancery of the City of Norfolk. Assuming that the issues had been properly raised, the petitioner does not state a case to which the Fourteenth Amendment would be applicable.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The respondent agrees that the sections set forth in the petitioner's brief are correctly quoted and that the respondent has no additional constitutional or statutory provisions.

QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THIS COURT HAS JURISDICTION IN REGARD TO THIS CAUSE WHEN THE FEDERAL ISSUE WAS NOT RAISED IN THE SUPREME COURT OF APPEALS OF VIRGINIA AND INADEQUATELY MENTIONED IN THE COURT OF LAW AND CHANCERY OF THE CITY OF NORFOLK.

2. WHETHER THE **VOIR DIRE** EXAMINATION IN THIS CAUSE RAISES A FEDERAL QUESTION UNDER THE FOURTEENTH AMENDMENT.

3. WHETHER THE FAILURE OF THE TRIAL JUDGE TO ALLOW THE JURY TO BE INTERROGATED IN THIS CAUSE RAISES A FEDERAL ISSUE UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION.

STATEMENT OF THE CASE

Respondent agrees with the statement of the case as set out by the petitioner but would add that although the petitioner discovered only a few days after the verdict of the jury on May 29, 1964, that the juror, Roy Miller, had allegedly done business with him some three or four years prior to this case, he did not bring this matter to the attention of the trial Court by way of affidavit until March 5, 1965, more than nine months after trial of the case. (Petitioner's Appendix p. A-2, Respondent's Appendix p. 2a).

ARGUMENT IN SUPPORT OF RESPONDENT'S CONTENTIONS

1. WHETHER THIS COURT HAS JURISDICTION IN REGARD TO THIS CAUSE WHEN THE FEDERAL ISSUE WAS NOT RAISED IN THE SUPREME COURT OF APPEALS OF VIRGINIA AND INADEQUATELY MENTIONED IN THE COURT OF LAW AND CHANCERY OF THE CITY OF NORFOLK.

The petitioner failed to raise a Federal Constitutional issue at the Supreme Court of Appeals of Virginia. On page 7 of the petition, the petitioner states, "The questions were raised in the Supreme Court of Appeals of Virginia by assignments of error in which the petitioner asserted at p. 45 of the Record that:" and thereafter is listed what the petitioner relies upon to raise a Federal question. It can be seen from reading the alleged errors numbered 6, 7 and 8 that the petitioner did not rely upon Federal Constitutional law in any respect. The concluding paragraph of that section of the petitioner's request for a writ concludes with the following: "The Federal questions were argued in the petition for a writ of error and oral argument in support of a writ of error." The petitioner did not at any time raise a

Federal Constitutional issue in his brief in support of the assignments of error to the Supreme Court of Appeals of Virginia. The petitioner relied in the Supreme Court of Appeals of Virginia purely on nonconstitutional law. The petitioner's table of citations in the appeals court quoted in our appendix (pages 2a, 3a, 4a, 5a) amply demonstrates this fact. There was no reference to law contained in the Constitution, federal statutes or treaties. *Beck v. Washington*, 369 U.S. 54 (1962) requires that the federal question relied upon in the petition must have been presented to the State Appellate Court. *Rule 23 1 (f)* is designed to effectuate this requirement. The petition shows that this was not done.

In the trial Court, the petitioner's attorney on page 5, line 5 of the Record, stated that the denial of obtaining this information, "is a denial of due process." There is no indication from that remark as to what exactly the petitioner is relying upon. Of course, the Virginia Constitution requires due process of law. No doubt, there are statutes also requiring due process. The only other reference to Federal Constitutional law in the entire case is found in item 1 as a ground for a motion for a new trial. This is recited at petitioner's Appendix p. B-3. In this instance, he relies upon the Constitution of Virginia and the Constitution of the United States. This Court has held that there is a presumption that the State Constitution is the one upon which the reliance is placed. *New York Ex rel Bryant v. Zimmerman*, 278 U.S. 63, 67-8 (1928). A mere reference to due process refers to the due process clause in the State Constitution, *Bowe v. Scott*, 233 U.S. 658, 664-5 (1914). The respondent submits that the averments to Federal law in the lower Court were not so distinct and positive as to effectively raise that issue in the trial Court as required in *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 655 (1897).

Assuming that the petitioner properly raised the issue in the trial Court, nevertheless, he failed to preserve the issue in his petition for a writ of error to the Supreme Court of Appeals of Virginia. In addition thereto, the petitioner has failed to set out what condition in *Rule 19* that he is relying upon in requesting a review of this decision on certiorari. There is no contention that this case falls within the purview of subsection *1 (a) of Rule 19*. No allegations are found to the effect that an important question of Federal law has been decided or that an important state question has been decided in a matter in conflict with other applicable state or territorial law. No statute of the State of Virginia is attacked. No case decision is attacked for its holding. No United States Supreme Court case is cited with which the decision in this cause is in conflict, nor has there been an allegation that the Court in this case has so far departed from the accepted and usual course of judicial proceedings that the powers of this Court should be exercised. The petitioner does not rely upon the equal protection clause of the Constitution of the United States. The petitioner relies solely upon due process. There is no allegation that the petitioner was treated any differently than anyone else has been treated.

2. WHETHER THE VOIR DIRE EXAMINATION IN THIS CAUSE RAISES A FEDERAL QUESTION UNDER THE FOURTEENTH AMENDMENT.

The petitioner under this subsection quotes for six pages the Third Circuit case of *Kiernan v. Van Schaik*, 347 F. 2d 775 (3rd Cir., 1965). This case is different from ours in that no *voir dire* was allowed in the lower Court in regard to that cause. As seen from the petitioner's Appendix p. A-3 and A-4, the Norfolk trial Court asked questions designed to determine whether or not the jury had any

knowledge of the happening of the accident or any other prejudicial relationships, pursuant to Virginia statutory law (*Code of Va.* (1950) § 8-199 (1957) *Repl. Vol.*). The *Kiernan* case dealt with Federal procedural law and not with the Fourteenth Amendment.

The State of Virginia does not have a compulsory automobile insurance law. There are many individuals who own automobiles who are licensed to drive motor vehicles without any type of insurance. Accordingly, it should not be assumed by jurors that a particular defendant does or does not have insurance. Under case decisions, it is not proper to introduce evidence or by other means to indicate whether or not the defendant is or is not protected by insurance. *Worrell v. Worrell,* 174 Va. 11, 4 S.E. 2d 343 (1939) and *Bradfield v. Board of Education,* 128 W. Va. 228, 36 S.E. 2d 512 (1900). The insurance or lack of it is not an issue in the trial of a negligence suit. It is improper to introduce it as an issue. Clearly, the interrogation of a jury as requested in the petition and as was done in the Third Circuit case tells the jury that the defendant has insurance. Otherwise, how would the questions have meaning? This is clearly not proper under Virginia law. If insurance is properly excluded from the trial of a case, the fact that an individual is associated with an insurance company should not operate to prejudice either party. The Court has allowed employees of the United States to sit as jurors on cases involving the United States.

Petitioner does not contend that *Section* 8-199, *Code of Virginia* (1950) (1957 *Repl. Vol.*) is in violation of either Constitution or that the trial Judge failed to comply with it. (The statute is found on page 3 of the petition.) The Court of Appeals of Virginia had ample opportunity to determine whether or not the trial Judge had erred under State law. The Court was of the opinion that the trial

Court was correct in its ruling.

States have been free under the Fourteenth Amendment to abolish juries. *Walker v. Sauvinet*, 92 U.S. 90 (1876); *New York C.R. Co. v. White*, 243 U.S. 188, 208 (1917) and *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). In fact, juries have been eliminated in certain proceedings in regard to mandamus, equity, eminent domain, etc., *Holmes v. Conway*, 241 U.S. 624, 631 (1916); *Long Island Water Supply v. Brooklyn*, 166 U.S. 685, 694 (1897) and *Montana Co. v. St. Louis*, 152 U.S. 160 (1894). States have been held to be equally able to adopt innovations respecting a selection and number of jurors. Verdicts rendered by less than twelve jurors have been held proper. *Jordan v. Massachusetts*, 225 U.S. 167, 176 (1912); *Maxwell v. Dow*, 176 U.S. 581, 602 (1900) and *Deigado v. Chovez*, 140 U.S. 586, 588 (1891).

3. WHETHER THE FAILURE OF THE TRIAL JUDGE TO ALLOW THE JURY TO BE INTERROGATED IN THIS CAUSE RAISES A FEDERAL ISSUE UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION.

The respondent in reply to the petitioner's question number 3 would request the Court to read the petitioner's Appendix beginning with C-4. The petitioner testified that he had never seen the juror, did not know his first name and did not recognize who he was. From this, it seems logical that the juror was faced with the same situation. The petitioner states the juror gave a false answer to a *voir dire* question. However, that assumes that the juror was more aware of what was happening on the *voir dire* examination than the petitioner himself was. Now, the petitioner complains that the Judge in refusing to allow this

juror to be interrogated some nine months after the jury trial was such an abuse of discretion as to amount to a violation of petitioner's Constitutional rights. We submit that the Record standing alone fails to disclose this. It might also be pointed out that the petitioner alleges that he found out about the identity of this man some three or four days after the trial; yet, it was some nine months later that he first filed a motion to the Court in regard to this issue (Petitioner's Appendix p. A-2, Respondent's Appendix p. 2a).

CONCLUSION

For the reasons stated above, we submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,
WILLIAM M. HARRIS
TERRY H. DAVIS, JR.
Of Counsel